No. 99-1978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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"[J]udges are also citizens, and * * * their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939). That is the principle that should control this case. When Congress extended to federal judges the obligation to pay Social Security taxes, it did nothing more than require judges to join the vast majority of other citizens in sharing the burden of financing a near-universal program of social insurance that benefits society at large. The great purpose of the Compensation Clause of Article III—promoting a judiciary fearless of political interference with the judicial function—was in no way undermined by Congress's inclusion

of judges in the national Social Security and Medicare programs.

1. *Law of the Case*. Respondents renew their contention (Br. 14-16), which they made in opposing certiorari (Br. in Opp. 15-17), that the Court should not give plenary consideration to the question whether Congress violated the Compensation Clause when it extended to judges the obligation to pay Social Security taxes. Respondents contend that that issue was definitively settled in 1996, when this Court was required to enter an order under 28 U.S.C. 2109 affirming the judgment of the court of appeals because the Court lacked a quorum to hear this case. On that point, we refer the Court to the discussion in our certiorari petition (at 19-21) and reply brief in support of that petition (at 4), and add the following:

First, the law-of-the-case doctrine prevents a court from reopening an issue only if that court actually decided the particular issue at an earlier stage of the litigation. See *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979). In this case, the Court did not actually decide the merits of the Compensation Clause issue when our prior petition was before it. The Court as a Court did not even examine the merits of that issue, because a quorum was not present; the Court's judgment affirming the decision of the Federal Circuit was entered solely by operation of law.

Second, even an affirmance by an equally divided Court "is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment." *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868);[1] see also *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972).

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[1] Respondents note (Br. 14) that, in *Durant*, the Court stated that a final judgment affirmed by an equally divided Court is "conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." 74

An order entered under Section 2109, like an affirmance by an equally divided Court, leaves the judgment of the court of appeals not disturbed, but also not endorsed, by this Court—much as if this Court denied certiorari (which would not, however, have been possible because it would have required action by a quorum of the Court).[2]

Third, respondents suggest (Br. 15-16) that several judges may have relied on this Court's prior order by accepting the offer of the Administrative Office of the United States Courts (AOUSC) to cease prospective withholding of Social Security taxes from their paychecks. The issue in this case,

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U.S. (7 Wall.) at 113. As we explain in the reply brief in support of the petition (at 4), however, in *Durant*, the Court was considering the res judicata effect of a final circuit court decree that an equally divided Court had previously affirmed. 74 U.S. (7 Wall.) at 109. The Court held that the decree was to be treated as final, just as would have been the case if it had been affirmed on a fully reasoned opinion or if the appeal had been dismissed. *Id.* at 112. The Court was not there considering the effect of an affirmance of an interlocutory order—which is not entitled to res judicata effect—nor was it considering the effect of an order affirming a lower-court judgment for lack of a quorum—which, unlike an affirmance by an equally divided Court, is entered by operation of law and does not reflect consideration of the merits of the case by the Court.

[2] Section 2109 was enacted in 1948, when this Court's docket still reflected a substantial number of mandatory appeals from state courts and federal courts of appeals. See Reynolds Robertson & Francis R. Kirkham, *Jurisdiction of the Supreme Court of the United States* 10-28, 209-226, 489-492 (Richard F. Wolfson & Philip B. Kurland eds., 2d ed. 1951). Congress evidently wished this Court to have recourse to a uniform practice without the need to distinguish between cases on appeal and cases on certiorari. Moreover, an alternative practice, such as dismissing the appeal or certiorari petition, would have presented another problem, in that a non-jurisdictional dismissal of an appeal by this Court—unlike an affirmance by an equally divided Court—has often been understood to reflect this Court's agreement with the lower court's disposition of the case (though not necessarily the lower court's reasoning). See *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 343 (1999); *Mandel* v. *Bradley*, 432 U.S. 173, 175 (1977) (per curiam).

however, is not whether judges must pay Social Security taxes that should have been, but were not, withheld in the past, but whether judges are entitled to a permanent prospective immunity from taxes based on a court of appeals' erroneous decision about the constitutionality of an Act of Congress. Moreover, a prudent review of the materials sent to federal judges by AOUSC demonstrates that judges should not have concluded that this Court's order had made them permanently immune from Social Security taxes.

The January 1997 memorandum from AOUSC to federal judges, accompanying its initial offer to cease withholding, made clear that the Justice Department had taken the position in this litigation (based on statute-of-limitations and remedy arguments) that, notwithstanding this Court's prior order, even the original plaintiffs in this case were entitled at most to minimal monetary relief and were not entitled to prospective cessation of withholdings. AOUSC thus urged judges to consult their own legal advisers.[3] The November 8, 1999, letter from AOUSC to judges renewing the offer to cease withholding was sent at a time when a panel of the Federal Circuit had concluded that all claims in this case other than the challenge to old-age, survivors, and disability insurance (OASDI) taxes made by the original eight plaintiffs were barred by the statute of limitations (see Pet. App. 125a-127a), and when the government had sought rehearing en banc of the panel's conclusion that the constitutional violation caused by the initial application of the taxes had not terminated when Congress raised judicial salaries (see *id.* at 122a-125a). AOUSC specifically told judges that "the Federal Circuit may not yet be finished with this case," stated that it was taking a "conservative

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[3] See Questions and Answers Regarding *Hatter v. United States* 1-2 (Jan. 1997), attached to Letter from William R. Burchill, Jr., Associate Director, AOUSC, to Seth P. Waxman, Solicitor General of the United States, *et al.* (Dec. 19, 2000) (lodged with the Clerk).

approach" by not initiating any changes in judges' withholdings, and observed that "some judges, because the litigation remains ongoing or for other reasons, may not wish to stop withholding."[4] Thus, whether or not it was prudent of AOUSC to offer to judges to cease statutorily-mandated withholdings at a time when there was no final judgment in this case, its communications made clear to judges that the courts had not definitively settled the permissibility of continued withholding of Social Security taxes.

Finally, this Court has declined to adhere to the law of the case when its earlier decision reflected an erroneous rule of constitutional law.[5] The Court has thus recognized that a manifest injustice is worked by knowingly persisting in the application of a decision that should be overruled. The court of appeals' decision on the merits, which this Court affirmed under Section 2109, relied squarely on *Evans* v. *Gore*, 253 U.S. 245 (1920). See Pet. App. 59a-61a. As we have shown, that decision is erroneous and does not survive closer scrutiny. See U.S. Br. 17-28. The merits of this case are thus properly before the Court for full consideration.

2. *Taxation as Diminution of Compensation.*

a. Respondents put forth a variety of theories (Br. 16-38) why the extension of a nondiscriminatory, generally applicable income tax to judges' salaries should be considered an unconstitutional diminution of their compensation.[6] Re-

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[4] See Memorandum to All Judges Potentially Affected, etc., from Leonidas R. Meacham, Director, AOUSC 1-2 (Nov. 8, 1999), attached to Letter from William R. Burchill, Jr., to Seth P. Waxman, *supra*.

[5] See *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997) ("In light of our conclusion that [*Aguilar* v. *Felton*, 473 U.S. 402 (1985)] would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a 'manifest injustice,' such that the law of the case doctrine does not apply.").

[6] Amici Los Angeles County Bar Association, *et al.*, argue (Br. 12-13) that there is significance to the fact that the Framers chose the word "compensation" rather than "salary" in Article III, suggesting that

spondents do not, we note, expend much effort in defending the broad proposition—which the court of appeals drew from this Court's decision in *Evans* (see Pet. App. 60a)—that *any* new tax imposed on the salaries of already-sitting judges is such a diminution simply because judges are left with less take-home pay than they had before they were required to pay the tax. As we have pointed out (U.S. Br. 29-33), that position presents insuperable difficulties, including that the same logic would prevent Congress from raising the rates of income taxes on judicial salaries as part of a generally applicable tax increase (a result respondents do not try to defend). Rather, respondents argue (Br. 19-23) that the Compensation Clause was intended to prevent evasions of judges' salary protection, and that if it is not construed broadly to preclude the imposition of *any* new tax on judges' salaries, then Congress could impose discriminatory taxes on judges. That submission is unpersuasive.

Congress intended by that word choice to protect judges' "effective" rather than legal compensation. That contention is incorrect. As the Court of Claims explained in *Atkins* v. *United States*, 556 F.2d 1028, 1050-1051 (1977), cert. denied, 434 U.S. 1009 (1978), the records of the Convention give no indication that the Framers attached any significance to the difference between the two words, but rather that they used them interchangeably. Indeed, the Compensation Clause requires that judges receive their Compensation "at stated Times," which is exactly the concept captured by the word "salary." See *id.* at 1050 (noting that "salary" means "a fixed payment made periodically to a person as compensation for regular work"). To the extent the word "compensation" might have a broader meaning than "salary," the difference might be reflected in cases such as *United States* v. *More*, 7 U.S. (3 Cranch) 159, 159 n.2 (1805), in which the Circuit Court of the District of Columbia (but not this Court) held that a statute that eliminated court fees for the benefit of justices of the peace in the District of Columbia could not be applied to justices appointed before the statute took effect. Even *More*, however, involved a direct elimination of a form of stated compensation for the benefit of Article III judges; it did not involve the application of a general tax to judicial compensation.

First, while the Convention framed the Compensation Clause to protect judges against the displeasure of the legislature, there is no suggestion in the historical record that, in so doing, the Convention also intended to exempt judges from obligations (even new obligations) such as taxes that are imposed on all citizens. The Framers acted against a decade of experience in which state legislatures had attempted to undermine the independence of the state judiciaries by several means, including the manipulation of judges' salaries. See Julius Goebel, Jr., *The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Volume 1: Antecedents and Beginnings to 1801*, at 98-100 (1971). Alexander Hamilton argued in *The Federalist* No. 79 that the language of state constitutions had not been adequate to prevent state legislatures from acting on their displeasure with state judges by diminishing judges' compensation; thus, a more definite protection of judges' salaries was necessary to ensure their independence from legislative interference.[7] It was particularly important that this protection of judicial salaries be firm because the Framers expressly vested in Congress the power to establish judges' compensation, and thus (they recognized) also gave Congress at least the opportunity for mischief when Congress cast its attention to judges in setting those salaries. That concern for judicial independence does not, however, justify granting judges a constitutional immunity from a general tax, which Congress imposes with the broad perspective of the entire society, and not a focus on the federal judiciary.

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[7] As Chancellor Kent explained, the Massachusetts state constitution, following an earlier English example, had provided that judges' salaries should be "established by law." 1 James Kent, *Commentaries on American Law* *295 (John M. Gould ed., 14th ed. 1896). Such language was presumably insufficient to prevent diminution in that a new statute could "re-establish" judges' salaries at a lower level.

Respondents point out (Br. 31 n.19, 32) that this Court invalidated Congress's rescission of salary increases for federal judges in *United States* v. *Will*, 449 U.S. 200 (1980), even though those rescissions affected the salaries of high-level Executive Branch officials as well as judges and were therefore, in a sense, nondiscriminatory.[8] That point may establish that the reach of the Compensation Clause's prohibition as defined by its literal language—which precludes any diminution of a judge's compensation as stated in law, regardless of the purpose of the diminution—was necessarily made broader than the Clause's core concern for preserving judicial independence. An express prohibition against only "discriminatory" or "improperly motivated" reduction of the judicial salaries that are prescribed by law might have presented a temptation to legislative evasion when Congress set judges' salaries. But that point does not establish that the Court must extend the reach of the Clause *beyond* its language to reach congressional taxing statutes of general applicability that have no relation to the Clause's core purpose of protecting judicial independence.[9]

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[8] Respondents selectively quote (Br. 23) the government's brief in *Will* for the proposition that the government conceded there that indirect as well as direct diminutions fall within the reach of the Compensation Clause. Respondents omit the immediately following sentence in the government's brief in that case: "In our view, the same standard-–which we suggest is set out in [*O'Malley* v. *Woodrough*, 307 U.S. 277 (1939)]–-is applicable to 'direct' and 'indirect' diminutions." U.S. Br. at 67, *United States* v. *Will*, *supra* (No. 79-983). In other words, the government argued in *Will* that only discriminatory taxation of judges could violate the Constitution, and argued that by the same measure nondiscriminatory salary reductions should not violate the Compensation Clause.

[9] In addition, the establishment of all high-level federal employees' salaries provides Congress with a greater opportunity for interference with the judiciary than does the enactment and application of a generally applicable tax, which does not focus on federal officials at all. While it is perhaps remotely plausible that Congress would reduce salaries of other officials along with the salaries of judges in order to punish the judges, it is

The Court should also reject respondents' submission (Br. 23) that, if the application of a generally applicable, nondiscriminatory tax to judicial salaries is permissible, then Congress will also be free to discriminate against Article III judges through taxation. In the first place, the Compensation Clause is not necessarily federal judges' only protection against such discrimination. Fundamental structural principles underlying Article III may well provide such protection,[10] as may the equal protection component of the Due Process Clause. Second, even if this Court concluded that, to prevent such an assault on judicial independence, it would be necessary to apply the protection of the Compensation Clause beyond its literal terms in order to prevent evasion, and thus to reach discriminatory taxation of federal judges—*i.e.*, to reach pretextual exercises of Congress's taxing power that were actually intended to erode the independence of the judiciary—that would hardly mean that it is *also* necessary to extend the Clause far further to *nondiscriminatory* taxation that presents no actual or po-

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inconceivable that Congress would impose a tax on society at large to punish judges.

[10] See, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (looking to the "text, structure, and traditions of Article III" to determine whether a statute contravened separation of powers principles); cf. *Alden* v. *Maine*, 527 U.S. 706, 713 (1999) (States' sovereign immunity is grounded not in the Eleventh Amendment but in "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution"); *Printz* v. *United States*, 521 U.S. 898, 918-919 (1997) (States' protection against federal commandeering lies not in a particular clause but in "the structure of the Constitution" and its "essential postulate[s]"); Resp. Br. 43 (citing *South Carolina* v. *Baker*, 485 U.S. 505, 525 (1988), for the proposition that even after this Court overruled the broad intergovernmenal tax immunity decisions on which this Court relied in *Evans* (see U.S. Br. 19, 22-23), States are still protected from *discriminatory* taxation).

tential threat to judicial independence.[11] This Court can distinguish proper from improper taxes on judicial salaries. As Justice Holmes memorably stated, "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (dissenting opinion); see also *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 488-490 (1939) (Frankfurter, J., concurring).[12]

b. Respondents also contend (Br. 27-33) that, even if the Compensation Clause would not have prevented Congress from applying Social Security taxes to the salaries of already-sitting judges when Congress first enacted the Social Security and Medicare programs, once Congress excluded judicial service from those programs, it was required

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[11] For the same reason, the Court should also reject respondents' suggestion (Br. 39-40) that, unless the Constitution prohibits the imposition of any new taxes on federal judges' salaries (as well as those of the President and Members of Congress), then Congress will be able to grant discriminatory relief from income taxes to the President and Members of Congress alone. Indeed, as we have pointed out (U.S. Br. 30-31), respondents' construction would *require* Congress to discriminate either in favor of or against the President and Members of Congress every time that it altered income tax rates, imposed a new tax on income, or eliminated an income tax, because the President's salary may not be "encreased" or "diminished" during his term of office, U.S. Const. Art. II, § 1, Cl. 7, and that of Members of Congress may not be "var[ied]" until an intervening election of Representatives, U.S. Const. Amend. XXVII.

[12] Respondents cite (Br. 24 n.13) state cases (*Carper* v. *Stiftel*, 384 A.2d 2 (Del. 1977), and *Hudson* v. *Johnstone*, 660 P.2d 1180 (Alaska 1983)) that have invalidated, under similar state constitutional provisions, new contribution requirements imposed on state judges to finance their judicial pensions. Those cases, however, did not involve generally applicable taxes assessed against citizens to finance a universal program of social insurance for the benefit of society at large. Rather, they involved an alteration in the mechanism for financing judges' deferred *compensation*, essentially forcing judges to pay more in the present for their pension in the future. Those cases therefore have no application to Social Security taxes, which finance a broad social program.

to maintain the tax exemption for sitting judges permanently. According to respondents, because the Clause "serve[s] to attract able lawyers to the bench and thereby enhances the quality of justice" (*Will*, 449 U.S. at 221), it must be read to preclude any congressional enactment that would upset the economic calculus made by judges when they accept a judicial appointment. In particular, respondents argue (Br. 27-29, 44-45) that, when they accepted judicial service, they anticipated that their judicial salaries, although perhaps generally lower than salaries in the private sector, would (unlike private-sector salaries) remain free of Social Security taxes. Thus, they contend (Br. 27), Congress's subsequent decision to extend those taxes to judicial salaries is invalid because it had the tendency to "induce judges to leave the bench."

Respondents' position is far removed from the text and purposes of the Compensation Clause. First, even the *Evans* Court noted that the function of the Clause is not "primarily to benefit the judges, [but] rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function." 253 U.S. at 248. The Clause does not, therefore, require Congress to freeze in place every expectation that judges have about their future level of compensation, as long as Congress neither reduces judges' salary stated in law nor impermissibly discriminates against judges so as to impair their independence. Indeed, this Court in *Will* rejected an argument very similar to the one pressed by respondents here, when it held that the Clause did not prevent Congress from preventing planned annual cost-of-living adjustments to judges' salaries from taking effect (as long as Congress acted before the effective date of those adjustments)—even though those adjustments had long been included in the statutory definition of judicial salaries, and even though the judges anticipated when they accepted their judicial commissions that they would receive those adjustments in

the future. See 449 U.S. at 226-227.[13] Although the judges argued in *Will* that they had been "promised" those annual adjustments, this Court stressed that "the Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges," *id.* at 227.[14]

In addition, respondents' proposed test (that a new tax or increased tax rate on judges' salaries is invalid if it has a tendency to induce judges to leave judicial service) is uncertain and imprecise of application. Numerous and varied factors shape judicial compensation and net income, and so any expectation that respondents might have had about the future level of their judicial compensation and net income when they accepted their commissions was highly speculative. For example, even if respondents anticipated when

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[13] When Congress legislated to prevent cost-of-living adjustments for judicial salaries from going into effect in Years 2 and 3 in *Will*, that legislation undoubtedly made judicial service relatively less attractive than the private sector, in which cost-of-living adjustments were subject to private ordering. It also made judicial service relatively less attractive than other federal-sector jobs, the salaries of which were adjusted in Years 2 and 3 to reflect increases in the cost of living. See U.S. Br. at 10-11, *United States* v. *Will*, *supra* (No. 79-983). Nonetheless, this Court held that Congress's cancellation of the planned adjustments in judicial salaries for Years 2 and 3 did not violate the Clause. 449 U.S. at 226-229.

[14] It was at that very point in its opinion that the Court in *Will* cited *O'Malley* for the proposition that "the Compensation Clause does not forbid everything that might adversely affect judges," 449 U.S. at 227 n.31. Significantly, the Court then continued by pointing out that because *O'Malley* overruled *Miles* v. *Graham*, 268 U.S. 501 (1925), and *Miles* relied on *Evans*, "*O'Malley* must also be read to undermine the reasoning of *Evans*," on which the district court in *Will* had relied in holding that judges had an interest protected by the Compensation Clause in future salary increases that they had been "promised." 449 U.S. at 227 n.31. *Will* thus greatly undermines respondents' reliance (Br. 44) on *Evans* for the proposition that the Compensation Clause protects against assessment of a new tax against judges' salaries simply because it would not be consistent with their expectations.

they accepted judicial appointments that they would not be required to pay Social Security taxes on their judicial salaries, their salaries net of tax might nonetheless have been reduced in an equivalent amount by adjustments in the generally applicable income tax rate (and respondents do not challenge Congress's power to adjust that rate in that fashion). In addition, respondents could not have had any enforceable expectation of statutory salary increases, since the Compensation Clause does not impose any obligation on Congress to increase judicial salaries. See *Will*, 449 U.S. at 228-229. Nonetheless, Congress has granted judges substantial salary increases since 1984. See U.S. Br. 8. Thus, even if respondents expected when they took office that their net salaries would remain no lower than they were at that time, that expectation was protected, because their statutory salary increases since 1984 far exceed the incidence of Social Security taxes on their 1984 salaries.

Respondents are also wide of the mark in arguing (Br. 27) that the extension of Social Security taxes to judges was invalid because the Framers wished to prevent judges from being placed in the position of petitioning Congress for restoration of their compensation. Although the Clause was undoubtedly intended to prevent Congress from bringing judges to heel by reducing their compensation, the Framers did not eliminate congressional authority over judicial salaries, but rather "delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives." *Will*, 449 U.S. at 227. Further, as we have explained (U.S. Br. 36), while the Framers understood that Congress's power over judges' statutory salaries carried a potential for abuse, Congress's power to tax those salaries in a nondiscriminatory way does not present the same concern because the legislature is responsive to the citizenry's objection to burdensome taxation.

Respondents argue (Br. 32-33), however, that no such protection from the citizenry was available to them in this case because in 1983 and 1984 Congress did not impose taxes on society at large for the first time, but rather extended preexisting general taxes to judges for the first time. It is not apparent, however, why any danger to judicial independence is presented by requiring judges in federal service to participate in the funding of a national program of near-universal social insurance that benefits the entire society. Under respondents' reading of the Clause, any time that Congress momentarily granted judges favorable income tax treatment—even through inadvertence, or based on a misapprehension of constitutional restrictions on taxation of judicial salaries—the Constitution would prohibit Congress from returning judges to a position of equal tax treatment with the general population. Such a result is far removed from the Compensation Clause's core concern of protecting judges from political interference with their independence.[15]

3. *Discrimination.* Respondents' alternative argument (Br. 33-38), that Congress impermissibly discriminated

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[15] The same argument that the Compensation Clause freezes any tax advantage enjoyed at any time by federal judges was rejected by a distinguished panel of the Fourth Circuit (including Chief Justice Stone) in *Baker* v. *Commissioner*, 149 F.2d 342, cert. denied, 326 U.S. 746 (1945). *Baker* involved a federal judge who was appointed in 1921, after Congress initially extended the income tax to judicial salaries in 1919, and also after this Court's decision in *Evans*. After the Court's decision in *Miles* v. *Graham*, 268 U.S. 501 (1925), Congress repealed the income tax on all judges' salaries until 1932; but after the decision in *O'Malley*, upholding the tax as applied to judges appointed after June 6, 1932, Congress re-extended the income tax to the salaries of all federal judges, including those who had taken office before that date. Judge Baker argued that, because Congress had at one point repealed the income tax on his salary, Congress was prohibited from ever reimposing it. The Fourth Circuit disagreed, rejecting the claim that "a judge is any the less subject to the tax, because in some years * * * Congress did not see fit to impose it." 149 F.2d at 344.

against federal judges when it brought them within the OASDI system, is also without merit. Respondents' claim of discrimination is based on the fact that, when Congress first made judges subject to the 5.7% tax imposed on almost all other citizens that finances the OASDI system, it left most incumbent federal employees subject to a *larger* (7%) salary deduction for the Civil Service Retirement System (CSRS), and required others (Members of Congress, congressional employees, and certain high-level Executive Branch officials) to choose between CSRS and OASDI. That was not discrimination; it was equalization.

To establish impermissible discrimination, respondents must show at a minimum that they were treated differently from others similarly situated. See *United States* v. *Armstrong*, 517 U.S. 456, 458 (1996); *Schweiker* v. *Hogan*, 457 U.S. 569, 585 (1982). But federal judges—who were not previously required to pay anything out of their judicial salaries to finance their own retirement annuities, but who were and are entitled to retire on an annuity at taxpayer expense (see 28 U.S.C. 371(a))—were not situated similarly to other incumbent federal employees, who were already required to contribute to CSRS.[16] Congress was therefore entitled to treat their situations differently.[17]

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[16] Respondents remark (Br. 35) that federal judges effectively pay for their retirement benefits themselves by accepting lower salaries than they would have received in the private sector. We do not question that many federal judges could receive greater compensation in the private sector, but the same is true of many other federal employees as well. See *Will*, 449 U.S. at 204 (noting that system for adjustment of federal salaries, including that for judges' pay, was intended "to bring federal employees' salaries in line with prevailing rates in the private sector"). Nevertheless, federal civil service employees have been required since 1920 to finance their retirement income out of their federal salaries, while federal judges were exempt from any such obligation before 1984. See U.S. Br. 3.

[17] Moreover, Congress treated the federal officers and employees most closely situated to federal judges before 1984—Members of Congress and

When Congress extended OASDI benefits and taxes to federal employment in 1984, it had two objectives (in addition to bringing as many federal employees as practicable within the OASDI system): to preserve federal employees' expectations in their long-funded civil service annuities, and to make all federal employees' salaries subject to one—but only one—contribution for a retirement income security program.[18] See J.A. 112-113. For most incumbent federal employees covered by CSRS, Congress accomplished those objectives by allowing them to remain in CSRS and not subjecting them to OASDI taxes. For others, including federal judges, Congress did so by bringing them within the OASDI system, and by allowing those officers and employees who previously had been covered by CSRS but were now made subject to OASDI taxes to terminate their CSRS coverage (and of course Congress also preserved judges' entitlement to their own retirement annuities at no cost to the judges). See J.A. 63-65. Thus, if federal judges had been allowed to "opt out" of OASDI, they alone, among federal officials and employees, would not have been required to make any contribution to either OASDI *or* CSRS. That would have been preferential treatment, not equal treatment. Cf. *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971) (not-

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congressional employees who were not subject to mandatory CSRS deductions—very similarly to federal judges. Those persons were required to elect between CSRS coverage and OASDI coverage. See J.A. 63, 65. Thus, a congressional employee who, like a federal judge, had not contributed to CSRS before 1984 was thereafter subject for the first time to a contribution from salary for retirement income security purposes.

[18] Respondents state (Br. 36) that new federal employees were in fact required to contribute twice, once to OASDI at a 5.7% rate, and once to CSRS at a reduced 1.3% rate. The net effect, however, was the same as the single 7% CSRS deduction from incumbent federal employees' salaries. Moreover, respondents can hardly demonstrate impermissible discrimination by showing that other employees were subject to more and greater contributions than they were.

ing that the "grossest discrimination" may lie in giving equal treatment to things that are not in fact alike).

4. *Termination of Violation.* Article III provides that the compensation of federal judges may not be "diminished." Respondents acknowledge (Br. 45) that, after Congress extended Social Security taxes to their salaries, it increased their salaries in an amount greater than those taxes. From that point, their salaries were no longer "diminished" in any reasonable sense of that word.

Our position is not, as respondents seem to believe (Br. 45-48), that the prospective statutory increase in judges' salaries retroactively "cured" or "remedied" any constitutional violation that may have occurred before those increases as a result of the extension of the challenged taxes. If respondents' salaries were unconstitutionally diminished in the amount of those taxes in the month before the salary increases took effect, then they must be made whole for that diminution.[19] But they are entitled *only* to be made whole to

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[19] Thus, respondents err in contending (Br. 47) that, under our submission, if a judge's salary were reduced from $100,000 to $25,000 and then increased to $101,000, the Compensation Clause violation caused by the reduction would be "remedied" by the increase. The increase would *terminate* the continued improper diminution of the judge's compensation, but it would not *remedy* the past violation. The judge would be entitled to be made whole for the full amount of the $100,000 salary, up to the point when Congress increased the salary to $101,000; but once the judge received $101,000, his salary would no longer have been "diminished."

There may be a separate constitutional question whether (as in respondents' hypothetical example, see Br. 47) Congress may discriminate *among* federal judges in setting salaries, but that issue is not presented here, for respondents' salaries are not less favorable than those of other federal judges. In addition, Congress has imposed the same Social Security taxes on all active judges' salaries. Indeed, it is respondents who would require Congress to make distinctions among federal judges in setting salaries, for as we have pointed out (U.S. Br. 42-43), respondents' position on remedy, which was endorsed by the court of appeals (see Pet. App. 122a), could well require Congress to establish at least two separate

the extent of the diminution; they are not entitled to receive a salary *greater* than the amount stated in law, as long as that amount is equal to or greater than the total compensation they should have received at all earlier times. If, for example, Congress improperly reduced judges' salaries from $140,000 per annum to $130,000, but then raised their salaries after a year at $130,000 to $150,000, then the judges unquestionably should recover the $10,000 that was improperly taken from them in the year before the later salary increase took effect; but they would not be entitled to recover $10,000 per annum in perpetuity *in addition* to the $150,000 annual salary. And that would be true whether or not one of Congress's purposes in increasing the salaries had been to terminate the constitutional violation caused by the diminution to $130,000.

Respondents' efforts to draw support for their contrary position from *Evans* and *Will* are unavailing. Respondents point out (Br. 48-49) that, immediately after Congress imposed income taxes on judges in 1919, it also raised judges' statutory salaries; yet, they note, the Court did not suggest in *Evans* that the salary increase terminated the constitutional violation caused by the taxation. But the Court in *Evans* concluded that *any* taxation of judges' salaries was unconstitutional; no salary increase could have terminated a violation caused by a tax under that theory. That point only underscores that *Evans* was wrongly decided. Respondents also note (Br. 48) that this Court ruled in *Will* that Congress

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salary levels for sitting federal judges, depending on their date of appointment. The Constitutional Convention was wary of the possibility of Congress's paying judges differentially based on their date of appointment; that prospect was the reason that Charles Cotesworth Pinckney successfully opposed a prohibition on increases in a judge's salary (because such a prohibition would have likely meant that later-appointed judges would be paid more than earlier-appointed ones). See 2 *The Records of the Federal Convention of 1787*, at 430 (Max Farrand ed. 1966).

unconstitutionally diminished judges' compensation in "Year 4" when it rescinded a statutory pay increase that had already taken effect, even though that rescission left judges with higher salaries than they had received in "Year 3." See 449 U.S. at 208-209, 229-230. But that rescission *did* diminish judges' salaries stated in law, because the statutory increase had already vested before it was rescinded. Cf. *Booth* v. *United States*, 291 U.S. 339, 352 (1934) (holding that the Clause prohibits "a diminution after an increase," even "if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office"). The Court did not suggest in *Will* that, in subsequent years, Congress was required to pay judges *more* than the full amount stated in law that had vested before the rescission, as respondents suggest.[20]

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[20] Amicus Federal Judges Association (FJA) seeks support (Br. 24-25) from the facts of "Year 5" in *Will*, when Congress again afforded judges a statutory salary increase and then again unconstitutionally rescinded it. FJA points out that the district court eventually awarded damages to the judges in *Will* in the full amount of the vested initial salary adjustments in both Years 4 and 5, and did not conclude that the salary adjustment in Year 5 offset the amount of the constitutional violation in Year 4. FJA overlooks the fact that, under the statutes governing federal pay, the 9.12% adjustment to judicial pay that took effect in Year 5 was legally based on the amount of judges' pay as if the full adjustment in Year 4 had taken effect and had never been rescinded, *not* the amount that judges received in Year 4 after the unconstitutional rescission. See *Will*, 449 U.S. at 204 (noting that district judges' pay is defined by 28 U.S.C. 225, which provides that those judges shall receive a salary "as adjusted by" 28 U.S.C. 461). Thus, the 9.12% salary increase for Year 5 applied to federal judges' salaries "as adjusted by" Section 461 in previous years, including the full extent of the adjustment for Year 4. Although Congress did attempt to rescind the Year 4 adjustment, that rescission was not part of the statutory "adjustment" to judicial salaries in Section 461, but was effectuated pursuant to a separate statute (see *Will*, 449 U.S. at 208-209) and thus was not factored into the Section 461 base for salary adjustments in future years. Indeed, when the President transmitted to Congress his federal pay proposals for Year 5, he noted both the salaries that federal

Respondents therefore err in asserting (Br. 49) that they seek only what the *Will* judges received, namely, damages for past diminution in their compensation. Respondents seek far more than the measure of their damages; they seek a perpetual bonus in addition to their statutory salary. The Constitution requires no such remedy.

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For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

FEBRUARY 2001

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judges should have received under Section 461 and the maximum amount payable to judges after the rescission. See H.R. Doc. No. 381, 96th Cong., 2d Sess. 81 (1980). Moreover, by the time the President sent those proposals for Year 5 to Congress, the district court in *Will* had already stated that, as a matter of statutory construction, it was doubtful that the rescissions in Year 4 applied to judicial salaries. See 449 U.S. at 210. Congress therefore understood that the 9.12% adjustment to judicial salaries for Year 5 would be based on the full amount of those salaries for Year 4, notwithstanding the rescission.